IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION.

CRIMINAL APPEAL NO. 209 OF 2000

Ashok Hari Pawar ..... Appellant.

versus

The State of Maharashtra ..... Respondents.

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Mr. M.R. Deshpande avcocate appointed for the appellant.
Mrs. U.V.Kejariwal APP for the State.

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CORAM ; V.G.PALSHIKAR &
ANOOP V. MOHTA, JJ.

DATED; 22ND SEPTEMBER, 2004.

ORAL JUDGMENT (Per Palshikar, J.);

1. Being aggrieved by the the order of conviction passed by the Additional Sessions Judge, Raigad in Sessions Case No. 171 of 1996 under sections 302 of IPC on 10-7-1997 the appellant has preferred this appeal on the grounds mentioned in the memo of appeal as also orally canvassed before us.

2. With the assistance of the learned counsel for the accused and the learned Prosecutor, we have scrutinised the records of the case and re-appreciated the evidence on record.

3. The prosecution story stated briefly is that on 10-8-1996 around 9.00 p.m. there was altercation between accused no.1 Ashok and the victim Navashya regarding the victim seeing the ailing mother of accused. He however told his wife Bhagibai to see what happened to the ailing mother. When the witness Bhagibai was enquiring about the mother, the victim Navashya also came there and the accused Ashok gave a stick blow on the head of the victim when the witnesses shouted and the accused again gave a blow of sickle on the neck of victim, as a result of which Navashya died. A complaint was lodged on the basis of which investigation was undertaken and prosecuted the accused/present appellant and accused no.2. The prosecution has examined 9 witnesses to prove its case. The learned trial Judge on appreciation of their evidence came to the conclusion that the prosecution has failed against accused no.2 but has proved its case in so far as accused no.1 is concerned. He therefore proceeded to convict the accused no.1 as aforesaid. The present appeal is directed against that conviction.

4. P.w.1 Bhagibai is the wife of victim Navashya. She has deposed in court regarding the whole incident, She has narrated the incident and stated that in the house of accused no.1 when she was enquiring about the mother

of the accused, Victim Navashya also came there and there was interaction between victim Navashya and the accused no.1 and the accused all of a sudden gave a blow of sickle on the forehead of victim Navashya on the left side. The witness therefore started shouting. The accused rushed up with a sickle and again turned around towards the victim and gave another blow of sickle on his neck and thereafter ran away. The witness has stated that the incident occurred in the night of gatari Amavasy as the custom is these Adivasi people drink alcohol to a large extent on that day. The witness admits that she was drunk. So was the accused and the victim. In her examination-in-chief she was asked to identify Article 10 which was sickle, if it was the sickle used for assault her husband by the accused. She saw it and stated that:

> "Sickle at article 10 now before the court was not the same sickle used by the accused no.1 at the time of incident."

There is therefore no weapon used and identified as one used in this case before the court. She then states in the cross examination that her husband received bleeding injuries and her saree also was stained with blood. She stated that she had shown that blood

stained saree to the police but the police did not affect any seizure of that saree. She then admits that on that day there was no electricity in the street. She specifically says that there is no electricity supply to their house. She has also stated in the cross examination as under:

> " For whole day, we were in the house. Myself and my husband were in the house prior to the incident and therefore, did not know as to what happened out of our house. Our houses are constructed by Government and therefore electricity was not provided."

She has also deposed that on the date of incident they were in their house and did not go anywhere for work. If this is a factual statement then the entire narration that she and the victim went to the house of the accused when the assault took place become unbelievable. The witness has completely falsified herself in the cross examination. She does not attribute anything to the accused no.2.

5 P.w.2 is Raghu. He is the son of victim and P.w.1 Bhagibai. This witness on hearing shouts of P.w.1 came to the spot and saw accused no.1 running away. He says

that he saw accused no.1 in the light of electricity in the street. P.w.1 has categorically admitted in the cross examination that on that day there was no electricity in the street. He is not an eye witness and could not have seen what he says he saw, if the statement of P.w.1 is to be accepted.

6. P.w.3 Vasant states that he heard the shouts and came out of the house and saw victim lying near the door of the house of accused no.1 and was lifted by him and brought to the house of victim. He has not seen anything and consequently his evidence is of no use.

7. P.w.4 Sakharam is declared hostile. P.w.5 Ganesh is the panch witness to the collection of earth samples and the panchanama of the dead body. P.w.6 Kaluram is the brother of the victim. He stated that when he was returning home, his nephew came running and told him that accused no.1 has given blow of sickle to his father Navashya. He then went to see the deceased who was lying near the house of accused no.1. There were injuries on his body and he had expired. He therefore complained to the police and lodged FIR. The evidence of this witness is therefore inconsequential.

8. P.w.7 Janardhan is the panch witness. He has proved the panchanama of seizure of clothes of accused no.1. He has deposed that they were blood stained. He has identified the accused as the person to whom the seized clothes belong. P.w.8 Naresh is the witness to the recovery of sickle at the instance of the accused.

He has proved the recovery.

9. P.w.9 Rajaram Lad is the investigating officer. This is all the evidence of the prosecution, which is accepted by the trial Judge as enough to convict the accused no.1 and acquit accused no.2. In so far as the acquittal of accused no.2 is concerned, there is no question of considering the same as there is no appeal by the State. In so far as the conviction of accused

no.1 is concerned, we find it impossible to sustain it

on the appreciation of evidence of Bhagibai who is the only eye witness to the incident. She has very candidly admitted the fact that her husband had never left the home and she was also with him. If it is to be accepted the narration that she and her husband went to the house of accused and altercation took place which resulted the accused assaulting the victim cannot be believed. If that is to be believed the witness is stating falsehood when the witness says that all along they were in the house. The witness also admits that

next day was gatari Amavasya and they were all the time in the house preparing for gatari Amavasya (see the original version). In the face of this, it cannot be said that there is any eye witness to the incident. The only thing which remains in the circumstances, is recovery of sickle at the instance of the accused. When the ocular testimony of P.w.1 is not acceptable, relying only on the recovery for conviction of the accused become unsafe. In our opinion, such conviction is not permissible in law. The evidence is grossly inadequate and therefore the learned trial Judge was wrong in accepting the same and convicting the accused only on the basis of recovery. In our opinion, therefore, the appeal is liable to be allowed.

10. In the result, the appeal is allowed and the judgment and order of conviction and sentence is set aside. The accused is acquitted. He be released forthwith if not required otherwise.

11. The amount quantified as fees payable to the learned Prosecutor and the learned advocate appointed for the appellant as Rs. 1000/- for this appeal.

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